90-1348

No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1990

IN RE: REVEREND ROBERT LEE BOND,

Petitioner

V.

ST. JOSEPH'S HOSPITAL, INC.,
ROBERT COFFEY, M.D.
DR. DWAIN MCDONALD, AND
MRS. DWAINE (JANE) MCDONALD,

Respondents.

PETITION FOR CERTIORARI

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ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

I. WERE REVEREND BOND'S 14TH AMENDMENT RIGHTS VIOLATED WHEN THE APPEALS COURT HELD THAT DISCLOSURE OF CONFIDENTIAL INFORMATION OR RECORDS UPON THE VERBAL REQUEST OF THE PATIENT/CLIENT IS NOT VIOLATIVE OF THE PROVISIONS OF ARTICLE 5561h?

II. WERE REVEREND BOND'S 14TH AMENDMENT RIGHTS VIOLATED WHEN THE APPEALS COURT AFFIRMED THAT THE TRIAL COURT DID NOT ERROR IN ADMITTING REVEREND BOND'S ST. LUKE MEDICAL RECORDS OF 1967 INTO EVIDENCE OVER OBJECTIONS OF HEARSAY, TIMELINESS OF OFFER OF THE RECORDS, RELEVANCY, AND A RULING EARLIER THAT THESE RECORDS WERE NOT DISCOVERABLE?

III. WERE REVEREND BOND'S 14TH AMENDMENT RIGHTS OF DUE PROCESS AND EQUAL PROTECTION VIOLATED WHEN THE APPEALS COURT AFFIRMED THAT THE TRIAL COURT DID NOT ERROR IN STRIKING DR. BOK'S EXPERT TESTIMONY REGARDING THE STANDARD OF CARE, AND REFUSED TO RULE ON RULE 13 SANCTIONS FOR THE DEFENDANT'S (ST. JOSEPH'S HOSPITAL) MAKING MISREPRESENTATIONS TO THE COURT THAT WERE MATERIAL TO REVEREND BOND'S CAUSES OF ACTION?

LIST OF ALL PARTIES

In order that the Justices of this Court may evaluate possible disqualification or refusal, the following list of all parties is provided:

Plaintiff/Appellant/Petitioner -

REVEREND ROBERT LEE BOND, represented by Bernard J. Dolenz, J.D., M.D.

Defendants/Appellees/Respondents -

ST. JOSEPH'S HOSPITAL, INC., represented by Richard Griffith.

DR. DWAIN MCDONALD, represented by Kleber C. Miller.

MRS. DWAIN (JANE) MCDONALD, represented by Kleber C. Miller.

DR. ROBERT COFFEY, represented by Estil Vance, Jr.

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OPINIONS BELOW

A take-nothing Judgment was entered on March 2, 1988 (T 125) with a timely appeal being perfected on May 18, 1988 (T 154).

This Judgment was challenged with 32 Points of Error; all of which were overruled by the Fort Worth Court of Appeals on June 5, 1990. (Appendix 3 - 10).

A Motion for Rehearing was overruled on July 24, 1990. (Appendix 11). The Supreme Court denied a Writ of Error with a notation "Writ denied" on October 17, 1990. (Appendix 12 - 13). The Supreme Court overruled a Motion for Rehearing on December 12, 1990. (Appendix 14 - 15).

The Decrees to be reviewed include the two points of error in the Appeal Opinion of June 5, 1990 and the subsequent rul-

ings of rehearing and denial of a Writ of Error.

JURISDICTION

This Court has jurisdiction pursuant to 28 USC Section 1651(a) for the review of all of the above appeal opinions, orders, and decisions.

STATUTES INVOLVED

These are in the Appendix and are:

Article 5561h - Confidentiality of mental health information of individual

Amendment XIV - U.S. Constitution

Texas Rule 13 - Effect of signing of pleadings, motions and other papers; sanctions

Texas Rule of Evidence, Rule 902(10)a

STATEMENT OF THE CASE

Reverend Bond, like 30% of the population, had chronic insomnia. This insomnia was refractory to treatment, and

finally a neuropharmacologist at Washington University at St. Louis placed him on Nardil, a medication which elevates tryptophane, which is now known to produce sleep. Nardil, an MAO inhibitor, is also used to treat depression.

Bond was Senior Pastor of the First Christian Church at Fort Worth, TX and experienced dizziness for which he sought treatment by Dr. McDonald, whose wife incidentally was also a Pastor at the same Church with Reverend Bond. Dr. McDonald, after learning that Reverend Bond had been on Nardil, referred him to Dr. Coffey. Both of these doctors independently breached medical and emotional confidences to a Church committee without WRITTEN CONSENT which caused Reverend Bond to be terminated. These doctors also prescribed an experimental and unreported drug combination (Deseryl and

Nardil), which produced a severe acute brain syndrome in Reverend Bond causing erratic cognitive thought processes and a hospitalization repleat with continuing negligent treatment, culminating in Reverend Bond being physically, emotionally, and financially injured to where he was "black-balled" from ever being a Pastor again. His wife has divorced him.

Reverend Bond contends that the Courts did not accord him equal rights pursuant to the 14th Amendment, and in violation of the Texas Statutes. No WRITTEN WAIVER was ever given to the doctors, and the doctors have never controverted this. Article 5561h mandates a WRITTEN WAIVER before health professionals can communicate to third parties about emotional problems of their patients. The Appeals Court, IN AN UNPUBLISHED OPINION, suggests that a VERBAL REQUEST does not

violate Article 5561h. There are other procedural irregularities that occurred during Reverend Bond's trial before the Honorable John Street, which were objected to, such as the admitting of Reverend Bond's medical records of 1967, and the striking of expert Dr. Bok, pursuant to misrepresentations made by St. Joseph's Hospital's attorney. Interestingly, Judge Street has been replaced by Judge Bruce Auld, who is the son-in-law of Reverend Bond.

JUDGMENT REVIEW - QUESTION I

POINT OF ERROR NO. 33

(PRESENTED IN SUPREME COURT MOTION FOR REHEARING)

THE APPEALS COURT ERRED IN HOLDING THAT DISCLOSURE OF CONFIDENTIAL INFORMATION OR RECORDS UPON THE VERBAL REQUEST OF THE PATIENT/CLIENT IS NOT VIOLATIVE OF THE PROVISIONS OF ART. 5561h. (CA OPINION p. 21).

When Chief Justice Phillips discusses in the media that he abhors "judiciary legislation", one wonders what is happening when the Appeals Court in Fort Worth gives its opinion to the effect that a written waiver is not necessary when mental health information is communicated to third parties when this Supreme Court gives an opinion that a "writ denied", the apparent effect is to uphold this bit of judicial legislation by the Fort Worth Appeals Court.

If this Supreme Court believes that the Fort Worth Appeals Court is correct, it would seem that this Court should give notice to all of the emotionally disturbed patients in Texas and make a ruling that the provisions of Article 5561h and its progeny do not require a written waiver. While unpublished opin-

ions seem to have no precedential value, they nonetheless are published and are scrutinized by the Bar. It would be a travesty of justice to have this "sleeper" unpublished. I am sure that the Supreme Court, after reflecting upon this issue, will want to do something informative congruent with legislative intent and not allow the disclosure of confidential information or records regarding mental health without written permission.

Reverend Bond has been denied equal protection under the law as well as due process as is guaranteed by the 14th Amendment of the U.S. Constitution, and Article 1, Section 19 of the Texas Constitution, and Article 1, Section 3 of the Texas Constitution which states that "All free men ... have equal rights ... "

In this regard, Reverend Bond should have protection of the Mental Health Code

Statutes as well as Article 5561h and its progeny that require a written waiver before mental health information can be communicated to third parties. The Fort Worth Court of Appeals is trying to set aside this right and the Supreme Court seems to be giving its imprimator to the Fort Worth Court of Appeals. Furthermore, Reverend Bond has a statutory vested right in his causes of action that should not be changed by interpretation. LEVINE V. MISLLER, 231 NW 201, Wis 633; HARRIS V. PETERSON, 220 NW 174, 196 Wis 310.

JUDGMENT REVIEW - QUESTION II

REGARDING ADMISSION OF REVEREND BOND'S MEDICAL RECORDS OF ST. LUKE'S FROM 1967

POINT OF ERROR NO. 1

(BRIEF BEFORE FT. WORTH COURT OF APPEALS)

THE TRIAL COURT ERRED IN ADMITTING REVEREND BOND'S ST. LUKE MEDICAL RECORDS INTO EVIDENCE (MCD EX 31; SF2374; 1864).

ARGUMENT AND AUTHORITIES

... a. HEARSAY

... hosital records to be admissible as an exception to the hearsay rule must comply with Rule 803(6) or Rule 902. Pursuant to 803(6), they must be introduced and authenticated by the custodian of records. Self authentication pursuant to Rule 902(10) requires that "such record or records along with such affidavits are filed with the Clerk of the

court for inclusion with the papers in the cause in which the record or records are sought to be used as evidence at least fourteen (14) days prior to the day upon which trial of said cause commences ...

Neither Rule 803(6) nor Rule 902(10) were complied with, and the St. Luke's Hospital records were therefore improperly admitted ...

... c. PRIOR RULING OF THE COURT THAT SUCH RECORDS COULD NOT BE OBTAINED ...

... Here, medical records were not REASONABLY RELATED to the claimant's allegations and nor did the Defendant show good cause why they should not have produced these records within 30 (thirty) days as required by Rule 166b(h). Certainly, if the Defendants had any problem over the four (4) years of this litiga-

tion regarding medical records, they had ample time to come to this Court for a re-hearing regarding the medical records. This, they opted not to do, until after the Plaintiff had closed his case in chief, and the Defendants were well on their way to closing.

... d. TIMELINESS

This has been covered earlier, but the 30 (thirty) day rule under Rule 166b(h) and the 14 (fourteen) day rule, under Rule of Evidence 902(10) have not been complied with.

Prior acts by one of the parties are not admissible to prove that similar acts have reoccurred. In this regard, the introduction of the St. Luke's records was error under the "res inter alios acta" doctrine. "Res inter alios acta" doctrine provides that prior acts or

transactions by one of parties are not admissible to prove that similar acts have reoccurred; prior acts are thus incompetent evidence when offered for such purpose. FRANK B. HALL & CO., INC., V. BUCK, 678 S.W. 2d 612, ref. n.r.e, certiorari denied 105 S. Ct. 2704, 86 L. Ed. 2d 720.

POINT OF ERROR NO. 1

(SUPREME COURT MOTION FOR REHEARING)

THE TRIAL COURT ERRED IN ADMITTING REVEREND BOND'S ST. LUKE MEDICAL RECORDS INTO EVIDENCE (MCD EX 31; SF2374; 1864).

Here, the Petitioner made objections of HEARSAY, RELEVANCY, PRIOR RULING OF THE COURT THAT SUCH RECORDS COULD NOT BE OBTAINED, AND TIMELINESS regarding the introduction of the St. Luke's medical record. The Respondents have used the "straw man" argument that the objections

were not specific enough and that Reverend Bond's "mental health" was at issue. The Petitioner contends that his objections were specific enough and that the main issues were false imprisonment and statutory violations involving breach of confidentiality and failure to advise him of his rights as promulgated by Articles 5547-24; 5547-86; 5547-25; 5547-70; 5547-71; and 5547-89.

Reverend Bond's "mental health" was not at issue as he described his problem as being one of insomnia and depression. Furthermore, the attorneys never defined "mental illness" to the patient. Furthermore, acute brain syndromes are due to disturbances in metabolic encephalopathy and accordingly are usually described as physical/neurological illnesses.

The Respondents distort the term "mental illness" and use it so loosely that

practically everyone, including most of the Justices on this Court, would fall into their "mental illness" category as there are metaphoric overtones.

As this Court knows, a witness may not be impeached by using an immaterial or collateral prior inconsistent statement. SPIRITAS V. ROBINOWITZ, 544 S.W. 2d 710 (Tex. Civ. App. - Dallas 1976 writ ref'd n.r.e). What the lawyers may have perceived as "mental illness" was never defined by them in their questions. What it may have meant was never clarified. Therefore, how can there be a predicate for proper impeachment.

ROBITSCHER, THE POWERS OF PSYCHIATRY, at 147 addresses some of this confusion:

"When a Judge or lawyer tiès to pin psychiatrists down on the definition of mental illness, he finds he has entered the labyrinth. The official glossary of the American Psychiatric Association, published in 1973, has no definition of

mental disease or mental illness, and it has only the most amorphous kind of definition of mental health. If you look up "mental illness" or "mental disease," you will be referred in each case to "mental disorder", but mental disorder is not defined. Instead there is a declaration that a mental disorder is anything that is included as a mental disorder in classification schemes of the World Health Organization and the American Psychiatric Association..." ROBITSCHER, THE POWERS OF PSYCHIATRY, 147.

In an interview with Dr. Thomas S. Szasz, quoted in 18 the New Physician 453 (1969):
Q: Dr. Szasz, what do you mean when you say that mental illness is a myth?

A: Disease means bodily disease. Gould's MEDICAL DICTIONARY defines disease as a disturbance of the function or structure of an organ or a party of the BODY. The mind (whatever IT is) is not an organ or a part of the BODY. Hence, it cannot be diseased in the same sense as the body can. When we speak of mental illness, then, we speak METAPHORICALLY. To say that a person's mind is sick is like saying that the economy is sick or that a joke is sick. When metaphor is mistaken for reality and then used for social purposes, then we have the making of myth. I hold that the concepts of mental health and mental illnesss are mythological concepts, used strategically to advance some social interests and to retard others, much as national and religious myths have been used in the past.

In the authoritative text Cecil TEXTBOOK OF MEDICINE, 17th Edition at 1985, the causes for acute brain syndrome are given and at 1974, the terms "delirium", "toxic psychosis" and "confusional state" are interchangeable with "metabolic encephalopahy". In the table on p. 1973, psychotropic drugs including lithium, phenathiazines (Thorazine), monoamine oxidase inhibitors (Nardil) are listed as causing metabolic brain disease which Reverend Bond received through the various negligent acts of the Defendants, when these Defendants made Bond seriously ill by experimenting with potent drugs.

Furthermore, Dr. Coffey indicated that Bond was normal after evaluating him, and before he even prescribed the Nardil/Deseryl combination. (SF 568-570).

As a diplomate of the American Board of

Neurology and Psychiatry, this attorney cannot find anything inconsistent with Reverend Bond's statements in the record regarding his emotional health as insomnia with concommitant depressive symptoms and a history of two acute brain syndromes (toxic deliriums/metabolic encephalopathy) are considered neurological disorders. To use the strawman argument of having "mental illness" without defining it is so loose that practically anyone living on this planet could be slotted into this category by any adversary to adversely prejudice his opponent.

The term "depression" is confusing as it may refer to a mood, a symptom or a syndrome. In Bond's case, his "depression" is a symptom and is reflective of a metabolic disorder wherein he needs an adequate amount of tryptrophane to sleep. This confusion is eluciated in EXHIBIT

"B" which is appended for the Court's benefit.

Therefore, the 20 year old medical records from St. Luke's should not have been admitted for both the legal reasons given earlier and for the medical reasons given now as there is no basis for impeachment. Furthermore, even if Reverend Bond had been "four plus crazy", his mental health was not on trial, and was not relevant. What was relevant was the negligences of the Defendants and the ruination of Bond's life as a professional with concommitant loss of his wife through divorce through incompetent medical practices of experimenting with incompatible drugs.

JUDGMENT REVIEW - QUESTION III
POINT OF ERROR NO. 6
(SUPREME COURT MOTION FOR REHEARING)

THE TRIAL COURT ERRED IN STRIKING DR. BOK'S EXPERT TESTIMONY REGARDING THE STANDARD OF CARE (T 26; T30; 1378-1393;1310, 1374; P EX 33).

Here, St. Joseph's uses the strawman argument that Dr. Bok did not supplement his deposition and that the only way that St. Joseph's fell below the standard of care was by not allowing Reverend Bond to use the telephone.

This is at odds with TR 30 regarding the Designation of Experts regarding Dr. Bok which states, "Dr. Bok will discuss standard of care as regards hospitals, psychiatrists, general practioners. He will also discuss the proper use of medications, tranquilizers. He will talk about experimental use of medications and the standards used in that protacol. He will discuss the Mental Health Code and

the rights that psychiatric patients have under the Mental Health Code. Dr. Bok's report has already been submitted. St. Joseph's as well as the other Defendants were placed on notice in Dr. Bok's report about what he would discuss. Dr. Bok did not supplement the deposition as he had no need to since what he gave in his live testimony was earlier noticed to the Defendants. St. Joseph's would have this Supreme Court believe that an expert should be limited to only his responses to the questions asked at deposition time. This spurious strawman argument by St. Joseph's flies in the face of the notice given to St. Joseph's in TR 30 as well as Dr. Bok's report. He changed no opinions, and St. Joseph's successfully torpedoed Dr. Bok's testimony by making misrepresentations to the Court for which Rev. Bond has sought Rule 215 sanctions.

In support of the misrepresentations to the Court by St. Joseph's and for Rule 13 and Rule 215 sanctions, portions of Dr. Bok's deposition have been attached to "Reply Brief for Appellant Reverend Robert Lee Bond", and are attached here as EXHIBIT "C".

It is bad enough for witnesses to make misrepresentations from the witness stand, but when lawyers make flagrant misrepresentations to the Court, one should be able to go beyond the record to show such egregious and disdainful conduct.

Accordingly, Dr. Bok's expert testimony regarding the standard of care should have remained since St. Joseph's had notice about his testimony and had his report. The Bok testimony shows that there was no inconsistency with the notice given to St. Joseph's about what he would testify.

ARGUMENTS FOR QUESTIONS I AND II

Reverend Bond contends that he was denied the equal protection of the laws in violation of Amendment XIV of the U.S. Constitution and Art. 1 Section 3a of the Texas State Constitution as the Courts did not protect his class, that is, a person who has emotional problems as promulgated by Art. 5561h which mandates that a WRITTEN WAIVER is necessary before health care professionals can communicate to third parties the emotional aspects of their patients. Rule of Evidence 510 is essentially the same as Art. 5561h and also applies. Additionally, the Trial Court and the Courts above did not respect his equal right protection regarding the admissibility of his medical records of St. Luke's Hospital as Rule of Evidence 902(10)a was not complied with because of inappropriate timing for its

production.

The Courts are bound by the 14th Amendment:

"The inhibitions of the Fourteenth Amendment include all the departments of state government, including not only the political, but also the judicial. Every state official, high and low, is bound by the Fourteenth Amendment. A similar scope is accorded to like state constitutional provisions. A constitutional mandate to maintain equality before the law and equal laws rests upon the judicial department of government with as much force as upon the other departments".

16A Am Jur 2d, Section 742, p. 790.

The Fort Worth Court of Appeals, in its unpublished opinion, has changed the meaning of Art. 5561h by stating that an ORAL WAIVER does not violate THE WRITTEN WAIVER PROVISION of this statute. If an ORAL WAIVER were permissible, the legislature would not have any need to pass Art. 5561h or Tex. R. Evid. 510. Certainly, the emotionally ill of whatev-

er sort needs to know about this legislation in a PUBLISHED OPINION so that they can be on notice of the consequences so that their lives, too, will not be in peril as happened in the Bond case. Certainly, the record reflects that Bond was deprived of his equal protection clause of the 14th Amendment as he was denied the same protection of Art. 5561h as have been enjoyed by other persons in like circumstances. In TUMLINSON V. STATE (App 5 Dist. 1988) 668 S.W. 2d 539, review refused, the Court held that a waiver privilege of confidentiality MUST BE IN WRITING, even though the state contended that the Defendant waived the privilege of confidentiality by ORALLY AGREEING to a psychologist calling the police.

The law seems settled regarding the guarantee of equal protection which

apparently the Texas Judiciary has denied to Reverend Bond:

> ...It has been repeatedly said that the guaranty of the equal protection of the laws means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances, in their lives, liberty, and property, and in pursuit of happiness. It has frequently been stated that "the equal protection of the laws is a pledge of the protection of equal laws." There is also authority to the effect that it means equality of opportunity to all in like circumstances. And it has been said that equal protection of the laws means that the rights of all persons must rest upon the same rule under the same circumstances."

16A Am Jur 2d Section 737 p. 774.

ARGUMENT FOR QUESTION III

The due process rights of Reverend Bond were violated when the Trial Court, relying on misrepresentations of St. Joseph's Hospital's attorney, struck expert Dr. Bok's testimony. To make matters worse, St. Joseph's Hospital continued its brazen falsities in its

Brief to the Fort Worth Court of Appeals. In a reply Brief, Bond pointed out the falsities in at least 15 (fifteen) controverting points that were in the Bok's deposition. Furthermore, the transcript showed that Bok had covered more than just "not allowing Reverend Bond to make telephone calls". Sanctions were asked of the Appeals Court, including but not limited to Rule 13 and Rule 215, for these brazen falsities.

While excerpts of the deposition were not part of the record, attorneys should not be given licenses to lie and make misrepresentations to the Court that cause grievous and harmful error. It would seem that the Courts would want to know about the truth more than whether every procedure was followed. The truth is something hard to get some people to listen to and harder to get them to believe.

While truth is not always popular, it is always right. Attorneys should not use word-smithing as a smoke screen to obscure the truth, but rather should use words as a search light to reveal the truth.

In this case, while the truth does not die about St. Joseph's misrepresentations, Reverend Bond has been "paralyzed" by the Appeals Court and the Supreme Court in failing to address this complaint in their opinions. It would seem that the Court would be more interested in getting the truth and not prejudice a party's case when the truth is brought to the Court's attention. Here, Reverend Bond's substantive and due process rights guaranteed him under the 14th Amendment were violated because of the silence of the Courts.

Furthermore, the Texas State Constitu-

tion, Article 1, Section 13, states: "All courts shall be open and every person or an injury done him, in his lands, goods, person or reputation, shall have remedy the due course of law". Here, Reverend Bond has been harmed by St. Joseph's misrepresentations, and yet the Courts have not given him an opportunity for the injury done him in violation of this constitutional prohibition.

At the very least, Reverend Bond contends that he should be given a new trial before an impartial Judge and allow his expert give unfettered testimony so that a proper conclusion can be made from the evidence regarding the truth:

> ... To judge in a contested proceeding implies the hearing of evidence from both sides in open court, a comparison of the merits of the evidence, a conclusion from the evidence of where the truth lies, the application of the appropriate laws to the facts found, and the rendition of judgment accordingly ...

16A Am Jur 2d Section 846 p. 1058

CONCLUSION

The Petitioner Reverend Bond prays that this Honorable Court review this Petition for Certiorari, and that upon such review find that Reverend Bond's 14th Amendment rights of due process and equal protection were violated, that this Honorable Court reverse the Judgment of the Courts below, and remand this cause for trial before a fair and impartial Judge, consistent with the opinions of this Court, award Petitioner costs of Court, and grant appropriate sanctions against St. Joseph's Hospital for its misrepresentations, and for general relief.

Respectfully submitted,

Bernard J. Dolenz, J.D., M.D.
Diplomate Am. Board of
Neurology and Psychiatry

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing instrument have been sent by regular mail on this the ____ day of February, 1991 to Kleber Miller, Estil Vance, Jr. and Richard Griffith.

Bernard J. Dolenz